

ASSEMBLY BILL

No. 46

Introduced by Assembly Member Cooper

December 5, 2016

An act to amend Section 1197.5 of the Labor Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 46, as introduced, Cooper. Employers: wage discrimination.

Existing law prohibits an employer from paying any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, unless the employer demonstrates that one or more specific factors, reasonably applied, account for the entire wage differential. Existing law also similarly prohibits an employer from paying any of its employees at wage rates less than the rates paid to employees of another race or ethnicity for substantially similar work.

Existing law authorizes an employee paid lesser wages in violation of these prohibitions to file a complaint with the Division of Labor Standards Enforcement, and authorizes the employee, the division, or the Department of Industrial Relations to commence a civil action for the wages the employee was deprived of because of the violation, interest on those wages, and liquidated damages. Under existing law, an employer or other person who violates or causes a violation of that prohibition, or who reduces the wages of any employee in order to comply with that prohibition, is guilty of a misdemeanor.

This bill would define “employer” for those purposes to include public and private employers. The bill would specify that a public employer is not subject to the misdemeanor provision.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1197.5 of the Labor Code is amended to
2 read:
3 1197.5. (a) An employer shall not pay any of its employees
4 at wage rates less than the rates paid to employees of the opposite
5 sex for substantially similar work, when viewed as a composite of
6 skill, effort, and responsibility, and performed under similar
7 working conditions, except where the employer demonstrates:
8 (1) The wage differential is based upon one or more of the
9 following factors:
10 (A) A seniority system.
11 (B) A merit system.
12 (C) A system that measures earnings by quantity or quality of
13 production.
14 (D) A bona fide factor other than sex, such as education,
15 training, or experience. This factor shall apply only if the employer
16 demonstrates that the factor is not based on or derived from a
17 sex-based differential in compensation, is job related with respect
18 to the position in question, and is consistent with a business
19 necessity. For purposes of this subparagraph, “business necessity”
20 means an overriding legitimate business purpose such that the
21 factor relied upon effectively fulfills the business purpose it is
22 supposed to serve. This defense shall not apply if the employee
23 demonstrates that an alternative business practice exists that would
24 serve the same business purpose without producing the wage
25 differential.
26 (2) Each factor relied upon is applied reasonably.
27 (3) The one or more factors relied upon account for the entire
28 wage differential. Prior salary shall not, by itself, justify any
29 disparity in compensation.
30 (b) An employer shall not pay any of its employees at wage
31 rates less than the rates paid to employees of another race or
32 ethnicity for substantially similar work, when viewed as a

1 composite of skill, effort, and responsibility, and performed under
2 similar working conditions, except where the employer
3 demonstrates:

4 (1) The wage differential is based upon one or more of the
5 following factors:

6 (A) A seniority system.

7 (B) A merit system.

8 (C) A system that measures earnings by quantity or quality of
9 production.

10 (D) A bona fide factor other than race or ethnicity, such as
11 education, training, or experience. This factor shall apply only if
12 the employer demonstrates that the factor is not based on or derived
13 from a race- or ethnicity-based differential in compensation, is job
14 related with respect to the position in question, and is consistent
15 with a business necessity. For purposes of this subparagraph,
16 “business necessity” means an overriding legitimate business
17 purpose such that the factor relied upon effectively fulfills the
18 business purpose it is supposed to serve. This defense shall not
19 apply if the employee demonstrates that an alternative business
20 practice exists that would serve the same business purpose without
21 producing the wage differential.

22 (2) Each factor relied upon is applied reasonably.

23 (3) The one or more factors relied upon account for the entire
24 wage differential. Prior salary shall not, by itself, justify any
25 disparity in compensation.

26 (c) Any employer who violates subdivision (a) or (b) is liable
27 to the employee affected in the amount of the wages, and interest
28 thereon, of which the employee is deprived by reason of the
29 violation, and an additional equal amount as liquidated damages.

30 (d) The Division of Labor Standards Enforcement shall
31 administer and enforce this section. If the division finds that an
32 employer has violated this section, it may supervise the payment
33 of wages and interest found to be due and unpaid to employees
34 under subdivision (a) or (b). Acceptance of payment in full made
35 by an employer and approved by the division shall constitute a
36 waiver on the part of the employee of the employee’s cause of
37 action under subdivision (h).

38 (e) Every employer shall maintain records of the wages and
39 wage rates, job classifications, and other terms and conditions of

1 employment of the persons employed by the employer. All of the
2 records shall be kept on file for a period of three years.

3 (f) Any employee may file a complaint with the division that
4 the wages paid are less than the wages to which the employee is
5 entitled under subdivision (a) or (b) or that the employer is in
6 violation of subdivision (k). The complaint shall be investigated
7 as provided in subdivision (b) of Section 98.7. The division shall
8 keep confidential the name of any employee who submits to the
9 division a complaint regarding an alleged violation of subdivision
10 (a), (b), or (k) until the division establishes the validity of the
11 complaint, unless the division must abridge confidentiality to
12 investigate the complaint. The name of the complaining employee
13 shall remain confidential if the complaint is withdrawn before the
14 confidentiality is abridged by the division. The division shall take
15 all proceedings necessary to enforce the payment of any sums
16 found to be due and unpaid to these employees.

17 (g) The department or division may commence and prosecute,
18 unless otherwise requested by the employee or affected group of
19 employees, a civil action on behalf of the employee and on behalf
20 of a similarly affected group of employees to recover unpaid wages
21 and liquidated damages under subdivision (a) or (b), and in addition
22 shall be entitled to recover costs of suit. The consent of any
23 employee to the bringing of any action shall constitute a waiver
24 on the part of the employee of the employee's cause of action
25 under subdivision (h) unless the action is dismissed without
26 prejudice by the department or the division, except that the
27 employee may intervene in the suit or may initiate independent
28 action if the suit has not been determined within 180 days from
29 the date of the filing of the complaint.

30 (h) An employee receiving less than the wage to which the
31 employee is entitled under this section may recover in a civil action
32 the balance of the wages, including interest thereon, and an equal
33 amount as liquidated damages, together with the costs of the suit
34 and reasonable attorney's fees, notwithstanding any agreement to
35 work for a lesser wage.

36 (i) A civil action to recover wages under subdivision (a) or (b)
37 may be commenced no later than two years after the cause of action
38 occurs, except that a cause of action arising out of a willful
39 violation may be commenced no later than three years after the
40 cause of action occurs.

1 (j) If an employee recovers amounts due the employee under
2 subdivision (c), and also files a complaint or brings an action under
3 subdivision (d) of Section 206 of Title 29 of the United States
4 Code which results in an additional recovery under federal law for
5 the same violation, the employee shall return to the employer the
6 amounts recovered under subdivision (c), or the amounts recovered
7 under federal law, whichever is less.

8 (k) (1) An employer shall not discharge, or in any manner
9 discriminate or retaliate against, any employee by reason of any
10 action taken by the employee to invoke or assist in any manner
11 the enforcement of this section. An employer shall not prohibit an
12 employee from disclosing the employee's own wages, discussing
13 the wages of others, inquiring about another employee's wages,
14 or aiding or encouraging any other employee to exercise his or her
15 rights under this section. Nothing in this section creates an
16 obligation to disclose wages.

17 (2) Any employee who has been discharged, discriminated or
18 retaliated against, in the terms and conditions of his or her
19 employment because the employee engaged in any conduct
20 delineated in this section may recover in a civil action reinstatement
21 and reimbursement for lost wages and work benefits caused by
22 the acts of the employer, including interest thereon, as well as
23 appropriate equitable relief.

24 (3) A civil action brought under this subdivision may be
25 commenced no later than one year after the cause of action occurs.

26 (l) *As used in this section, "employer" includes public and*
27 *private employers. Section 1199.5 does not apply to a public*
28 *employer.*